IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 435.

EMORY S. LAND, Individually and as Chairman of the United States Maritime Commission, et al., *Petitioners*,

v.

WATERMAN STEAMSHIP CORPORATION.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

BON GEASLIN,
520 Investment Building,
Washington 5, D. C.,
Attorney for Respondent.

ALLEN J. KROUSE,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

SUBJECT INDEX

	Page
Questions Presented	1
Statutes Involved	2
Statement of the Case	2
Summary of Argument	6
Argument	7
I. The Petition Should Be Denied for the Reason That It Presents No Substantial Question of General Importance That Should be Settled by This Court, Nor Does the Decision of the Court Below Conflict with the Applicable Decisions of This Court	7
II. A Proceeding Under the Declaratory Judgment Act is Appropriate for the Determination of the Rights of the Parties to a Controversy Even Though Another Remedy is Available	10
III. The Charter Agreements Entered Into by the Respondent with the British Ministry of War Transport are not Contracts with a Department Within the Meaning of Section 403 of the Renegotiation Act of 1942, as amended	15
(a) The terms of the charter agreements show they are not contracts with the Commission	15
(b) The Congress refused to amend the Renegotiation Act to cover contracts with foreign countries	20
IV. Judicial Intervention is Proper When the Petitioners Have Already Acted by Illegally Setting in Motion Administrative Machinery not Applicable to Respondent's Charters with the British Government	23
V. The Administrative Machinery Established by The Renegotiation Act is Limited to a Determination of Whether Excessive Profits Exist with Respect to any Contract with a "Department", and the Amount Thereof	28

Page

VI. The Determinations and Demands of the Petitioners are Void as Having Been Made Without Authority of Law and Respondent is Entitled to Equitable Relief 32

VII. The Doctrine of the Myers Case is not Applicable, Because the Statute Under Consideration There Provided Adequate Administrative and Judicial Remedies 34

VIII. Where a Multiplicity of Actions is the Only Alternative, the Intervention of Equity is Justified 38

IX. Money Withheld and Covered Into the Treasury is Beyond Reach of Any Suit at Law 39

X. In No Event Could Respondent in any Forum Recover Interest on the Money so Seized 41

Conclusion 42

Appendix A 43

Appendix B 44

TABLE OF CASES.

Aetna Life Insurance Co. v. Haworth, 300 U. S. 227 . . 10
Allen v. Regents, 304 U. S. 439 38
American Life Insurance Co. v. Stewart, 300 U. S. 203 . . 40
American School of Magnetic Healing v. McAnnulty, 187 U. S. 94 . . . . . 28, 34
Anniston Manufacturing Co. v. Davis, 301 U. S. 337 . . 37
Bradley v. Richmond, 227 U. S. 477 37
Brillhart v. Excess Insurance Co. of America, 316 U. S. 491 13
California v. Latimer, 305 U. S. 255 42
Columbia Broadcasting System, Inc. v. United States, 316 U. S. 407 15
Delno v. Market Street Railway Co., C. C. A. Cal. 1942, 124 F. (2d) 965 10
Dobson v. Commissioner of Internal Revenue, 320 U. S. 489 36
Ex Parte Young, 209 U. S. 123 38
Fields v. United States, 205 U. S. 292 9
First National Bank v. Weld County, 264 U. S. 450 37

Page

Forsyth v. Hammond, 166 U. S. 506 9
Gilchrist v. Interborough Co., 279 U. S. 159 35
Great Lakes Dredge and Dock Co. v. Huffman, 319 U. S. 293 13
Henkels v. Sutherland, 271 U. S. 298 41
Hines v. United States, ex rel Marsh, 70 App. D. C. 206, 105 F. (2d) 85 37
Hooe v. United States, 218 U. S. 322 40
Hopkins v. Southern California Telephone Co., 275 U. S. 393 ..... 38, 41
In Re Fassett, 142 U. S. 479 29
Isthmian Steamship Co., Inc. v. Land, et al, Civil Action No. 29546 12
Maryland Casualty Co. v. Pacific Coal and Oil Co., 312 U. S. 270 13
Minnesota Ex Rel. Pearson v. Probate Court, 309 U. S. 270 37
Muschany v. United Stafes, 324 U. S. 49 22
Myers v. Bethlehem Shipbuilding Corporation, 303 U. S. 41 ..... 6, 34, 35
Natural Gas Pipeline Co. v. Slattery, 302 U. S. 300 37
Nelson v. First National Bank of Sioux City, 42 F. (2d) 30 35
Newport News Shipbuilding and Drydock Co. v. Schauffler, 303 U. S. 54 15
Old Colony Trust Co. v. Commissioner of Internal Revenue, 279 U. S. 716 36
Perkins v. Elg, 69 App. D. C. 175, 99 F. (2d) 408 13
Phelps v. United States, 274 U. S. 341 40
Philadelphia Company v. Stimson, 223 U. S. 605 28
Raymond v. Chicago Union Traction Co., 207 U. S. 20 38
Robinson, et al. v. Deal, et al., 79 U. S. App. D. C. 241, 145 F. (2d) 382 39
Rochester Telephone Corporation v. United States, 307 U. S. 125 34
Shields v. Utah Central Railroad Co., 305 U. S. 177 33
Skinner & Eddy Corp. v. United Sates, 249 U. S. 557 ..... 32, 33
Spector Motor Service Inc. v. McLaughlin, 323 U. S. 101 13
Stark et al. v. Wickard, 321 U. S. 288 ..... 9, 26
Trust Company v. Schnader, 291 U. S. 24 25
Union Pacific Railroad Co. v. Board of County Commissioners, 247 U. S. 282 38

Page

United States v. Algoma Lumber Co., 305 U. S. 415, 17, 18, 19, 20
United States v. Atchison, Topeka & Santa Fe Railroad Co., 234 U. S. 476 34
United States v. Goltra, 312 U. S. 203 ..... 40, 41
United States v. North American Transportation and Trading Co., 253 U. S. 330 40
U. S. v. Rimer, 220 U. S. 547 9
United States v. U. S. Fidelity & Guaranty Co., 10 C. C. A. 1939, 106 F. (2d) 804 41
Utah Fuel Company v. National Bituminous Coal Commission, 306 U. S. 56 33
Waite v. Macy, 246 U. S. 606 ..... 28, 34
Wilson v. Illinois Southern Railway Co., 263 U. S. 574 38
Yakus v. United States, 321 U. S. 414 36

STATUTES CITED.

Act of April 21, 1808, c. 48, Sec. 3 (2 Stat. 484) 17
Act of March 3, 1911, c. 231 (36 Stat. 1141) 41
Customs Administrative Act of June 10, 1890 (26 Stat. 131) 30
Declaratory Judgment Act 2
Renegotiation Act of 1942 ..... 2, 29, 32, 33
Revenue Act of 1943 ..... 2, 23, 26
Suits in Admiralty Act, c. 315 (47 Stat. 420, 46 U. S. C., Sec. 745) 41
U. S. C. Title 25, Sec. 407 18
U. S. C. Title 26, Sec. 1100 35
U. S. C. A. Title 26, Sec. 1117(b) 29
U. S. C. Title 46, Sec. 808 ..... 2, 16

OTHER AUTHORITIES CITED.

Executive Order No. 8802, dated June 25, 1941, 6 F. R. 3109 17
H. R. 3316, 78th Congress, 1st Session 21
House Report No. 733, 78th Congress, 1st Session 21
House Report No. 1079, 78th Congress, 2nd Session 29
Joint Statement by the War, Navy and Treasury Departments and the Maritime Commission 3
Report No. 871, House of Representatives, 78th Congress, 1st Session 28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 435.

EMORY S. LAND, Individually and as Chairman of the United States Maritime Commission, et al., *Petitioners*,

v.

WATERMAN STEAMSHIP CORPORATION.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

QUESTIONS PRESENTED.

1. Whether the petition presents a substantial question of general importance that should be settled by this Court.

2. Whether agreements for the charter of vessels entered into by the respondent steamship company with the British Ministry of War Transport, an agency of the British Gov-

ernment, are contracts with a "Department" within the meaning of Section 403 of the Renegotiation Act of 1942, as amended.

3. Whether individuals, who are officials of the United States and who are acting without authority of law, may be enjoined from renegotiating charter agreements entered into between the respondent steamship company and the British Ministry of War Transport.

4. Whether the courts have jurisdiction to enter a declaratory judgment of the rights of the parties in a case of actual controversy involving no question of administrative discretion, and where no adequate or exclusive remedy is provided by statute.

5. Whether the Courts may enjoin administrative officials from renegotiating charter agreements entered into by the respondent steamship company with the British Ministry of War Transport, under the Renegotiation Act, which does not afford an adequate administrative remedy, or any remedy at all, and enter judgment declaring the rights of the parties to the controversy.

STATUTES INVOLVED.

The relevant section of the Shipping Act, 1916, and the Declaratory Judgment Act, are set forth in Appendix A and Appendix B, pages 43 and 44.

STATEMENT OF THE CASE.

This is a suit against the individuals named, as Chairman of the Maritime Commission (hereafter referred to as the Chairman) and his representatives, the members of the Maritime Commission Price Adjustment Board (hereafter referred to as the Board) to restrain them from applying the provisions of the Renegotiation Act of April 28, 1942, c. 247, Title IV, Sec. 403, U.S.C. Title 50 App., Sec. 1191 (56 Stat. 245), as amended by the Revenue Act of 1943, Sec.

701, Public Law No. 235, 78th Congress, 2nd Session, to charter agreements entered into between respondent and the British Ministry of War Transport. The Renegotiation Act authorizes and directs the Chairman to renegotiate contracts with the United States Maritime Commission (hereafter referred to as the Commission) when in his opinion the profits realized or likely to be realized thereunder may be excessive.

On April 25, 1941 and several dates subsequent thereto the respondent entered into charter agreements with the British Ministry of War Transport, an agency of the British Government, (hereafter referred to as the British Ministry) for the charter to it of certain vessels owned by respondent, in accordance with the terms and conditions set forth in the charter agreements attached to the complaint. (R. 5)

The final payment of the agreed charter hire on each vessel was made to respondent under the terms of the charter agreements, on the respective dates specified in the complaint, the latest of which was November 28, 1941, approximately five months prior to the enactment of the Renegotiation Act of 1942. (R. 7) Respondent completed its obligations to the British Ministry under the terms of each of the charter agreements, and said charters were terminated on the respective dates specified in the complaint, the latest of which was January 26, 1942, more than one whole fiscal year prior to the purported commencement of renegotiation of said charter agreements by the Board. (R. 7) The fiscal year of the respondent in 1942 and for many years prior thereto ended on September 30. (R. 4)

On November 26, 1943, the Board representing the Chairman, purporting to act pursuant to the provisions of the Renegotiation Act and the Joint Statement by the War, Navy, and Treasury Departments and the Maritime Commission, promulgating the Purposes, Principles and Policies and Interpretations of such agencies under said Act (R. 33) served upon the respondent by registered mail "Notice of

Initial Conference Under the Renegotiation Act Which Shall Constitute Commencement of Renegotiation." (R. 29) The respondent was directed to appear before the Board on December 13, 1943 for an initial conference and to furnish said Board with certain statements, information and financial data to be used in determining whether respondent had realized excessive profits from its charter agreements with the British Ministry. (R. 30)

Respondent was advised in such notice that if the time fixed for the conference was not satisfactory, the Board would entertain a request in writing "In the form hereto attached" for a continuance to a later date. The form attached to said notice requested a continuance of the initial conference with the Board "in the renegotiation with the undersigned contractor which has been commenced pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended." (R. 32)

On December 13, 1943, respondent filed with the Board a letter denying the authority of the petitioners to require the renegotiation of, or their authority to renegotiate the charter agreements, and denying that such charter parties were contracts with a "Department" as defined in the Renegotiation Act. (R. 39) In addition, respondent asserted that final payment of the charter hire had been made prior to the enactment of the Renegotiation Act, and the charters were completed in a fiscal year ending more than one year prior to the purported commencement of renegotiation.

Thereafter on May 23, 1944, petitioners, by their representatives, notified respondent that: (R. 43)

> "After considerable study of the entire Red Sea operation, I am satisfied that there was in each case a contract between the vessel owner and the Maritime Commission to which the Renegotiation Act is applicable."

It was further stated in said notice of the Board that it

> "would not ask the vessel owners to go to the trouble of furnishing any financial data until I was satisfied

that there was a renegotiable agreement with the Commission."

The notice further stated:

> "In view of the foregoing I suggest a conference at this office, 1200 15th Street, Washington, D. C. * * * at 10:00 A.M. on June 29 with Waterman Steamship Company *for the purpose of determining what portion of the profits of these companies is excessive within the meaning of the Act.*" (Italics ours).

The notice demanded that respondent submit statements, information and financial data in accordance with a proposed outline attached thereto. This consisted of a document entitled "Statement in Renegotiation" in the *form of an affidavit* in which the officer of respondent executing the same *would make oath*, among other things as follows:

> "(1) that I am an officer to wit.....of..... the Contractor signing Exhibits A and B hereto attached;
>
> "(2) that I am duly authorized to execute this statement on behalf of *said Contractor;*"

Exhibits A and B referred to therein consist of certain general information and financial data regarding the respondent corporation, and voyage data in detail with respect to each of the vessels chartered by respondent to the British Ministry under the so-called Red Sea Charters. (R. 45-48)

On June 27, 1944, respondent filed its complaint herein (R. 2 et seq.) for an injunction and for a declaratory judgment.

On June 28, 1944, respondent filed its motion for a preliminary injunction (R. 48). On July 10, 1944, petitioners filed their Motion to Dismiss (R. 50-51) upon the grounds that (a) the Court lacks jurisdiction over the subject matter of the action, and (b) that petitioners failed to show any injury to respondent, and had failed to exhaust its administrative remedies.

The District Court denied respondent's motion for preliminary injunction and dismissed the complaint on the authority of *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41 (R. 51). On appeal, the Court below reversed and remanded the case to the District Court for consideration of the single question "Were the charter agreements, entered into in 1941 by Waterman Steamship Corporation and the British Ministry of War Transport, contracts with a 'department' within the meaning of Section 403 of the Renegotiation Act of 1942?" (R. 66)

SUMMARY OF ARGUMENT.

I.

The petition presents no substantial question of general importance that should be settled by this Court, since the decision of the Court below will not interfere with the administration of the Renegotiation Act.

II.

Declaratory Judgment is an appropriate remedy for the determination of the rights of the parties to a controversy, even though another remedy may be available.

III.

The Renegotiation Act confers upon petitioners no authority to renegotiate contracts with a foreign government.

(a) The terms of the charter agreements in controversy show they are not contracts with the Maritime Commission.

(b) The Congress, although requested to do so, refused to amend the Renegotiation Act to cover contracts with foreign countries.

IV.

The Courts may intervene to prevent the acts of administrative agencies beyond the scope of their authority.

V.

Neither the petitioners nor the Tax Court have authority to make any determinations, except as to the amount, if any, of excessive profits resulting from the performance of contracts with the Maritime Commission.

VI.

Where an administrative agency has made determinations and issued orders beyond the scope of its authority, such acts are subject to judicial review by Declaratory Judgment, or in equity.

VII.

In order to deprive an equity court of jurisdiction, an administrative remedy must be available, and must be adequate to meet the requirements of due process.

VIII.

The relief granted by the court below will prevent a multiplicity of suits.

IX.

The relief granted by the court below is necessary to prevent irreparable injury to respondent.

ARGUMENT.

I.

The Petition Should be Denied for the Reason That It Presents No Substantial Question of General Importance That Should be Settled by This Court, Nor Does the Decision of the Court Below Conflict with the Applicable Decisions of This Court.

At the outset of the consideration of the question presented by the petition, it should be clearly understood that the charter agreements involved in this controversy are not

"government wartime contracts" as asserted by petitioners (Petitioners' brief p. 10). Therefore, a denial of the petition could have no effect upon the administration of the Renegotiation Act as it applies to contracts entered into with any "Department" as defined in that Act. The charters are contracts with a foreign government, a class of agreements which Congress refused to include within the terms of the Renegotiation Act, notwithstanding that recommendations were made to it for such inclusion.

Petitioners argue that unless they are permitted to apply the Renegotiation Act to contracts entered into by respondent with a foreign government, that the statutory procedure for dealing with the renegotiation of contracts with the departments specified in the Renegotiation Act will be destroyed. They say that the courts may not interfere to prevent the unlawful renegotiation of contracts with a foreign government which has been commenced by petitioners, and which involves an invasion of the rights of the respondent and which, if concluded by unilateral action by the petitioners will deprive respondent of his property by the withholding, without lawful authority, sums which may be due it on contracts with the United States.

The central issue, therefore, is whether a citizen who entered into contracts with a foreign government in 1941, and which have not been subjected to renegotiation by the Congress, is required to stand by helplessly while an administrative agency renegotiates such contracts by carrying out unlawful determinations already made, adversely affecting the interest of the respondent, and whether the respondent is required to comply with the unlawful demands of petitioners for financial statements, data and other information with respect to such contracts.

There is no other instance of record where either of the administrative agencies designated by statute to renegotiate contracts entered into with a "Department", has commenced renegotiation or has attempted to renegotiate contracts which were not entered into with one of the departments specified in such act.

There is nothing in the record to show, and indeed the petitioners do not claim, that the charter agreements were entered into with the Maritime Commission. The petition, therefore, presents no question of general importance involving the administration of the Renegotiation Act and, must be denied.[1]

The effect of the decision below is limited to the fifteen other steamship companies who entered into charter agreements with the British Ministry in the same manner and form and at about the same time that the charters in controversy in this case were entered into. Petitioners' brief (footnote 8, page 10) cites the fact that several of these companies have brought suits to enjoin the renegotiation of such charter agreements and for declaratory judgments.

The two hundred renegotiation cases pending in the Tax Court, cited in footnote 9 on page 11 of Petitioners' brief, all relate to contracts entered into with one of the "Departments" specified in the Renegotiation Act, or to subcontracts entered into thereunder.

Therefore, the decision of the Court below that the respondent herein is entitled to have a declaratory judgment as to whether the charter agreements entered into with the British Ministry are contracts with a "Department" within the meaning of the Renegotiation Act is proper, and will not in the least interfere with the renegotiation of any contract entered into with a "Department" as defined in such Act.

Because Congress has passed no law with respect to the renegotiation of contracts with a foreign government, the petitioners were and are acting without any authority in law, and the question of the substitution of the judgment of the court for that of an administrative agency is not involved. The power of petitioners is circumscribed by the authority granted. *Stark et al.* v. *Wickard*, 321 U. S. 288.

---

[1] *U. S.* v. *Rimer*, 220 U. S. 547; *Fields* v. *U. S.*, 205 U. S. 292; *Forsyth* v. *Hammond*, 166 U. S. 506.

Respondent, under the circumstances, had no recourse, except to the courts. There is no question here that is either novel or extraordinary, such as to warrant the granting of the writ. Obviously, the decision below is consistent with the rulings of this Court governing attempts by administrative bodies to exercise power beyond the scope of the authority conferred upon them. The procedure approved in that decision is necessary to the protection of the rights of the respondent on the one hand and to the sound and lawful administration of the Renegotiation Act on the other. Since the record does not support the propositions urged by petitioners, the petition must be denied.

II.

A Proceeding Under the Declaratory Judgment Act is Appropriate for the Determination of the Rights of the Parties to a Controversy Even Though Another Remedy is Available.

It is fundamental that where rights are invaded as they have been here, or immediately threatened, Federal Courts may give relief by either traditional remedies or by declaratory judgment.[2]

Where a declaratory judgment will clarify and settle legal relations in issue and where it will terminate, and afford relief from uncertainty and controversy, it is an appropriate remedy.[3] And it is a remedy which may be granted without regard to the existence of a remedy elsewhere and even in the absence of alleging that "irreparable injury is threatened."[4]

There is here a controversy between parties who face each other in an adversary proceeding. The dispute is definite and concrete. Prior to the suit, the parties had

---

[2] *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227.

[3] *Delno* v. *Market Street Railway Co.*, C. C. A. Cal. 1942, 124 F. (2d) 965.

[4] *Aetna Life Insurance Co.* v. *Haworth*, *supra*.

taken adverse positions with respect to the questions in issue.

Respondent's legal and constitutional rights have been and are affected and brought into question by the conduct and threatened conduct of petitioners. The question of legality of the action of petitioners in determining to apply, and in applying the Renegotiation Act to the charter agreements entered into between the respondent and the British Government has arisen between the parties hereto; namely, whether the Renegotiation Act confers upon petitioners authority to apply its provisions to said charter parties and to make the determinations heretofore made and to take further threatened action thereunder. This question is fundamental to all activity of the petitioners with respect to the renegotiation of such charter agreements. Respondent has persistently claimed that petitioners could not rightfully or lawfully determine that the charter agreements between the respondent and the British Government are contracts with the Maritime Commission and subject to the provisions of the Renegotiation Act; that they cannot rightfully or lawfully apply said Act to the charters or do any act or take any steps with respect thereto. Petitioners assert that they are legally authorized by the Renegotiation Act to apply said Act to such charters and have commenced renegotiation and made certain determinations with respect thereto. They have (1) definitely rejected respondent's claim that the charter agreements are not subject to the provisions of the Renegotiation Act; (2) have determined affirmatively that the charter agreements are contracts with the Commission, and (3) that a portion of the profits realized therefrom constitute excessive profits within the meaning of the Renegotiation Act. (R. 43) With respect to such charter agreements, petitioners plainly intend to perform what they consider their duty under the provisions of the Renegotiation Act and will, unless the Courts intervene, determine the portion of the profits resulting from the per-

formance of such agreements, which, in their opinion, constitutes excessive profits within the meaning of the Renegotiation Act. They intend to and will withhold the amount, so determined by them, from sums due respondent on contracts with the United States.[5]

A declaratory judgment in respect of whether the Congress has provided for the renegotiation of the charter agreements entered into between the respondent and the British Government would terminate the controversy between petitioners and respondent and remove all uncertainty between them with respect thereto, and would set said controversy at rest before it leads to a further invasion of respondent's rights. The renegotiation, when consummated by unilateral action of the petitioners, with consequent withholding of large amounts of respondent's monies now due or to become due on contracts which it holds with the United States, would give rise to much involved controversy and litigation, with claims and counter claims over a long period. It would result in a multiplicity of suits in various jurisdictions and put respondent to great expense and cause prejudicial uncertainty in respondent's financial position in respect to its shipping business. The respondent has no remedy or adequate means of relief against, or in avoidance of, the unlawful acts done and threatened, except by intervention of the Courts under the Declaratory Judgment Act or the traditional remedy of injunction.

This case, therefore, presents a controversy between parties having adverse legal interests, of sufficient immedi

---

[5] In *Isthmian Steamship Co., Inc.* v. *Land, et al.*, Civil Action No. 29546, referred to in footnote 8, page 10 of Petitioners' Brief, the Board has notified the plaintiff there that it has made a "tentative finding of excessive profit" in the sum of $959,525.74, and under date of June 15, 1945 notified plaintiff that it would be afforded a period of two weeks within which to indicate its agreement or disagreement with such finding. Similar action has been taken against other steamship companies with respect to the Red Sea charters. Actions were brought to restrain further proceedings in renegotiation of such charters.

acy and reality to warrant the entering of a declaratory judgment.[6]

This proposition was recently upheld by the Court in *Spector Motor Service Inc. v. McLaughlin*, decided December 4, 1944, 323 U. S. 101, which was a suit brought in a United States District Court to enjoin the enforcement of a Connecticut State Tax and for a declaratory judgment that the statute did not apply to complainant.

The constitutionality of the statute had not been determined by the Courts of Connecticut with respect to the application of the statute to the business of petitioner. This Court held that a declaratory judgment proceeding was appropriate, stating:

> "The District Court had jurisdiction to entertain this bill and to give whatever relief is appropriate * * * *because of the uncertainty surrounding the adequacy of the Connecticut remedy.*" (Italics ours)

The case, therefore, was remanded to the District Court with directions to retain the bill pending the determination of proceedings in the state court.

In *Perkins* v. *Elg*, 69 App. D. C. 175, 99 F (2d) 408 (affirmed 307 U. S. 325), the Court sustained the action of the District Court in granting an injunction and a declaratory judgment as well. In that case the complainant had been born in this country, of naturalized parents and during her infancy taken back to her parents' native land of Sweden. Upon reaching her majority she returned to this country and was given a passport. Later it was found that her father had no intention of again becoming a permanent resident of this country and she was immediately declared to be in the country illegally. She was threatened with arrest and deportation in the event she did not leave the

---

[6] *Maryland Casualty Company* v. *Pacific Coal and Oil Company*, 312 U. S. 270; *Brillhart* v. *Excess Insurance Co. of America*, 316 U. S. 491; *Great Lakes Dredge and Dock Company* v. *Huffman*, 319 U. S. 293.

country voluntarily. However, as a matter of grace the threatened action was held in abeyance, but the officials of the Labor and State Departments still maintained that her entry was illegal. She brought suit to enjoin the threatened action on the part of the officials and also for a declaratory judgment, declaring her status as a citizen of the United States. The contention was made there that she had a remedy at law by submitting to arrest and testing the question by a writ of habeas corpus. But the Court of Appeals said:

> "The trial court, as we have seen, concluded that the case was properly brought within the declaratory judgment statute. We are of the same opinion.
>
> "* * * There is no other proceeding at law by which appellee could obtain an adjudication that she is a United States citizen,—certainly none by which she can obtain that adjudication without being subject to arrest and confinement until her case may be heard on a petition of habeas corpus. * * * she is entitled to a declaration of her political status, for her rights as a citizen are valuable rights,—certainly no less valuable than property rights,—and an actual and vital controversy exists between her and the government in relation to them."

The only difference in the *Elg* case and the case at bar is the kind of right involved. It is clear, therefore, that where an administrative agency is exceeding its statutory authority or where the remedy provided in the statute is inadequate, a declaratory judgment proceeding is proper.

III.

The Charter Agreements Entered Into by the Respondent with the British Ministry of War Transport are not Contracts with a Department Within the Meaning of Section 403 of the Renegotiation Act of 1942, as Amended.

(a) The terms of the charter agreements show they are not contracts with the Commission.

If the charter agreements are not contracts with the Maritime Commission, there is no law governing their renegotiation, and the commencement of renegotiation on November 26, 1943 was outside the authority of the petitioners, under the Renegotiation Act, dealing with Government contracts.

This case came before the District Court upon a verified complaint and motion to dismiss. Thus, "accepting the allegations of the complaint as true, as for the present purposes we must,"[7] the question presented on the record is whether the charter agreements between respondent and the British Ministry are contracts with the Maritime Commission. This is a question of law which can be decided only by the courts.[8]

The charter agreements were for the hire of the vessels of respondent only for outward voyages to the Red Sea area. Each such agreement provides that:

> "It is this day mutually agreed between *Waterman Steamship Corporation*, owners of the Steamship .....of.....tons net register, classed First Class American Bureau of Shipping now trading *and British Ministry of War Transport* Charterers, as follows:" (R. 18) (Italics ours).

---

[7] *Columbia Broadcasting System, Inc.* v. *United States*, 316 U. S. 407, 414.

[8] *Newport News Shipbuilding and Drydock Company* v. *Schauffler*, 303 U. S. 54, 57.

The charters then proceeded through 28 articles to set the terms of the agreements. They were signed in the names of the respondent by its proper officials and by the representative in the United States of the British Ministry.

Rates are provided for the space of each vessel. The British Ministry has the right to change the discharge ports within certain ranges, and provision is made for appropriate adjustments in the charter hire in such cases with refunds where required, payable to the British Ministry. That agency is required to load, stow and trim the cargo at its own expense and to pay the cost of discharging the cargo, along with port charges incidental thereto. The British Ministry has the right to cancel the charter party if the vessel shall not be ready to load at the time designated, and provision is made for payment of demurrage charges to the respondent for delays in loading and discharging cargo. (R. 20, 21)

The charters provided (Article 25) that the British Ministry has the privilege of securing commercial cargo to fill out space in the vessel and that the revenue from such cargo shall be credited to the British Ministry. (R. 27)

Article 28 provides that the charter shall not become effective until approved by the Commission, and that any dispute arising under the charter shall be settled by the Commission. (R. 27)

The form of the charter agreements, their execution and submission to the Commission for approval conform to the long-established requirement of law with respect to the chartering of vessels to aliens.[9] If the charters had been entered into with the Commission, their approval would not have been required by law. Furthermore, the provision that disputes between the parties to the agreements shall be settled by the Commission negatives the suggestion that that agency was a party to the agreements.

The Commission could not have maintained an action against respondent for breach of its charter agreements

[9] Act of Sept. 7, 1916, c. 451, Sec. 9 (39 Stat. 730, as amended) U. S. C. Title 46, Sec. 808 (App. A, p. 43).

with the British Ministry. Neither could respondent maintain an action against the Commission for failure of the British Ministry to meet its obligations under the charters. In the absence of this mutual right the assertion that the charters are contracts with the Commission cannot be supported. For as the Court has said:[10]

> "In this, as in any other case of a written contract, those who are parties to and bound by it are to be ascertained by an inspection of the document, and its provisions are controlling in the absence of some positive rule of law or provision of statute requiring them to be disregarded."

The non-governmental character of these charters is not only evidenced by the provisions of the charters themselves, but is also made clear by the fact that they do not contain certain provisions which all United States Government contracts are required by law or Executive Order to contain. The Act of April 21, 1808, c. 48, Sec. 3 (2 Stat. 484), as amended, U. S. C. Title 41, Sec. 22, which was in effect at the time the charters were executed, provides that there shall be inserted in every contract or agreement made or entered into on behalf of the United States an express provision that no member of or delegate to Congress shall be admitted to any share or part of such contract or to any benefit to arise thereupon. None of the charters involved in this controversy contains any provision such as that required by that statute.

Executive Order No. 8802, dated June 25, 1941 (6 F. R. 3109) provides in part that all contracting agencies shall "include in all defense contracts hereafter negotiated by them a provision obligating the contractor not to discriminate against any worker because of race, creed, color or national origin." None of the charters being considered here, which was executed after the effective date of this Executive Order, contains the provision required by that order to be inserted in government contracts.

---

[10] *United States v. Algoma Lumber Co.*, 305 U. S. 415, 421

The United States Government frequently approves agreements between third parties, indeed often undertakes to establish the terms and conditions under which other parties may contract, and to counsel and advise in connection with private contracts without in any way assuming a contractual obligation thereunder.

This is well illustrated by the decision of the Court in *United States* v. *Algoma Lumber Company, supra.*

In that case, Congress provided[11] that the "timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales shall be used for the benefit of the Indians of the reservation in such manner as he may direct." Acting under authority of that statute, the Superintendent of the Klamath Indian School, Klamath Agency, Oregon, received bids made by Algoma Lumber Company. Thereupon, a contract was prepared between the Superintendent of the Klamath Indian School and Algoma Lumber Company which was submitted to and approved by the Assistant Secretary of the Interior.

The contract provided that disputes arising thereunder should be determined by the Secretary of the Interior. Payments required to be made under the contract were made to the Superintendent of the Klamath Indian School and were by him remitted to the United States Treasury for the use and benefit of the Indians. The contract reserved to the Commission of Indian Affairs the right periodically to adjust the contract price.

A controversy arose as to whether certain increases in the contract price which were made by the Commissioner and paid under protest by the company exceeded the prescribed limits for such price increases established by the contract. Thereupon, the company brought suit in the Court of Claims for a refund on the theory that the contract on which the alleged overpayments were made was a Govern-

[11] Act approved June 25, 1910, c. 431, Sec. 7 (36 Stat. 857) U. S. C. Title 25, Sec. 407.

ment contract and that the Court of Claims could entertain suit thereon. The Court of Claims found that overpayments had in fact been made and held that plaintiff might recover the amount thereof.[1]

On the Government's appeal, the Supreme Court reversed the Court of Claims, holding that the contract in suit was not a Government contract but was one with the Indians, notwithstanding the fact that the manner of sale was prescribed by the Secretary, the contracts were executed by the Superintendent and approved by the Secretary and the prices of lumber were fixed by the Indian Commissioner. Speaking for the Court, Mr. Justice Stone said: (pp. 421-2)

> "Neither the United States nor any officer purporting to act on its behalf is named a party to the contract. By its terms the contract is declared to be entered into 'between the Superintendent of the Klamath Indian School, for and on behalf of the Klamath Indians, party of the first part' and the Lumber Company, 'party of the second part'. It is thus upon its face the contract of the Klamath Indians executed by the Superintendent, acting as their agent. * * *
>
> "Respondents point only to Sec. 7 of the Act of 1910 and the Regulations prescribed under it as compelling a different result. They argue that the requirements that the manner of sale be prescribed by the Secretary, that the contracts be executed by the Superintendent and approved by the Secretary, and that the prices of lumber be fixed by the Indian Commissioner, indicate a purpose to make the United States, acting as guardian or trustee of the Indians through the Secretary and Superintendent, the contracting party. But, as we have said, all that was done by the government officials in supervising the execution of the contracts and their performance was consistent with the exercise of its function as protector of the Indians without the assumption by the United States of any obligation to the purchasers of the timber, and no implied obligation on its part arises from the performance of that function."

---

[1] 86 Ct. Cl. 226

The contract in that case and the circumstances attending its negotiation, execution and approval presented a very much stronger argument in favor of its being a contract with the United States than with respect to the charter agreements between the respondent and the British Ministry. In approving the charters, the Commission was merely exercising the function of controlling the chartering of American-flag vessels to aliens. It did not execute the contract, a fact which, in the *Algoma* case, precluded the enforcement against the Government of any contractual claim.

Petitioners have not attempted to controvert these facts. Indeed, they must be taken as admitted by the motion to dismiss. The Court must find from the record that as a matter of law, the charter agreements between the respondent and the British Ministry were not contracts with the Commission. That fact precludes the exercise by petitioners, with respect to these charters, of powers vested in the Chairman by the Renegotiation Act in respect to contracts with the Maritime Commission.

(b) The Congress refused to amend the Renegotiation Act to cover contracts with foreign countries.

In enacting the Renegotiation Act or in amending it, Congress might have provided that the test of whether a given contract is to be subject to renegotiation would be (a) whether the United States is interested in the contract, or (b) whether the United States approves it as to form, or (c) whether the contract price is set by the United States, or (d) whether the contract is related to the prosecution of the war, or (e) whether the contract is financed by means of United States Government funds. But Congress did not prescribe any of those tests; the test prescribed by Congress in the original Renegotiation Act and through four successive amendments thereof is whether a contract is one *with a department*, as that term is defined in the Act.

Before the renegotiation proceedings had been instituted by the petitioners with reference to the British Government contracts involved in this case, it was recommended by the Committee on Naval Affairs of the House of Representatives that contracts of American firms with the Allied governments, the financial obligations under which had been assumed by the United States, pursuant to arrangements between such governments and the United States, acting in accordance with the Lend-Lease program should be subjected to renegotiation.[13]

To carry out this recommendation, the Chairman of such Committee introduced a bill in the House of Representatives, September 22, 1943, which was referred to the Committee on Ways and Means.[14]

---

[13] House Report No. 733, 78th Congress, 1st Session, pp. 25, 26. The Report states:

> "During the course of the investigations made by the Committee, our attention was also directed to a group of lend-lease contracts which appear to be at the present time outside of the scope of renegotiation. *Prior to our entry into the war, the British and other Allied Governments in 1940 and 1941 placed large orders with many American firms for war material.* These contracts were subject to the same uncertainties of cost that have characterized the war contracts entered into by the War and Navy Departments. * * * *We think that the law should be amended so as to subject this group of contracts to renegotiation.*" (Italics ours.)

[14] H. R. 3316, 78th Congress, 1st Session. Section 11 provided for the amendment of Section 403(k) of the Renegotiation Act to read in pertinent part, as follows:

> "(k) All the provisions of this section shall be construed to apply to Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, Rubber Reserve Company, the Department of Agriculture, the War Shipping Administration, and to contracts with any foreign government, or any agency thereof, described in section 403 (i) (1) (i) hereof. * * *"

The amendment [illegible] section 403 (i) (1) (i) (Section 10 of the Bill) provided for re[illegible]ation of contracts with any foreign government or agency thereof where any department or any other agency of the United States acquires the interest of any foreign government in a contract entered into by such foreign government with a contractor doing business in the United States. The provisions

Although the Ways and Means Committee recommended a great number of amendments to the Renegotiation Act, which (with modification) were enacted by the Congress on February 24, 1944, the recommendations of the Naval Affairs Committee were not enacted into law. The statute, as so amended, retained in effect the basic requirement that a contract be one *with a department* before the Renegotiation Act could lawfully be applied to it. By failing to extend the Renegotiation Act to British Government contracts financed by the United States through advancements under the Lend-Lease program, although it was requested so to do, Congress clearly indicated its intention that the Act should not apply to such contracts.[17]

In this connection the comment of the Court in *Maschauer v. United States*, 324 U. S. 49, would seem to be controlling. There the Court said:

> "Congress' adoption of statutes providing for the renegotiation of war contracts indicates that in certain instances the government seeks to recover abnormally high contract profits. That Congress could have extended the coverage of these provisions to these contracts is unquestioned; the fact that it did not do so cannot be disregarded by this Court."

We are not dealing here with a case involving contracts with a "Department" where respondent "has merely been requested to present certain information at an initial renegotiation conference" as suggested by petitioners. The petitioners have commenced renegotiation and have made

---

of the bill did not even include the Red Sea Charters. No agent of the United States acquired the interest of the British Government in such charters.

[17] The charter hire was paid by the Maritime Commission, pursuant to an arrangement between an agency of the United States and an agency of the British Government "with respect to payments required to be made by the British Ministry of War Transport under the form of charter party prepared by the Maritime Commission * * *." (R. 28) Respondent was not a party to, nor was it consulted with respect to, such arrangement, and took no part in the discussions leading to its consummation. (R. 7)

certain determinations, and have notified the respondent of the same. The Board, representing the Chairman, on November 26, 1943 commenced renegotiation by mailing to the respondent, by registered mail, a "Notice of Initial Conference Under the Renegotiation Act Which Shall Constitute Commencement of Renegotiation." (R. 29)[16]

It was suggested in the notice that an application for the continuance of the conference to a later date would be considered by the Board. The form of application for continuance, attached to the notices, contained a request for the continuance of the initial conference with the Board "in the renegotiation with the undersigned contractor *which has been commenced pursuant to Section 403*" etc. (Italics ours) (R. 32). It was also suggested in the notice that respondent might state reasons why the Red Sea Charters were not subject to renegotiation (R. 31).

The respondent on December 13, 1943, the date set for the initial conference, filed a letter with the Board denying the authority of the Board or the Chairman to renegotiate the charter agreements for the reason, among others, that they were entered into with the British Government and were not contracts with the Commission.[17] (R. 39 et seq.) Respondent refused to furnish the information and financial

---

[16] Section 403 (c)(4) provides: "The mailing of such notice by registered mail to the contractor or subcontractor shall constitute the commencement of the renegotiation proceeding." App. C, p. 27)

[17] The Chairman has determined that contracts with the Commission are not subject to renegotiation if final payment, pursuant to such contract was made prior to April 28, 1942 and that "payment will be deemed to have been made although relatively small unliquidated items may not have been finally determined and paid for". (R. 36) The Chairman has also determined that the term "completion * * * of the contract" means final delivery or acceptance under the contract and the fact that there may be unliquidated items outstanding, does not extend the time of completion beyond date of final delivery or acceptance. (R. 37) If the charters in controversy were contracts with the Commission they would be exempted by these determinations of the Chairman made pursuant to Section 403 (c)(6)(i). (Unnumbered paragraph of Section 403 (c)(6)(iii), Appendix C, pages 11 and 12)

data demanded by the Board in such notice.[18] Respondent was notified by letter dated May 23, 1944 (R. 43) of the determinations heretofore referred to on pages 4 and 5 of this brief. Therefore, the petitioners' statement in their brief (footnote 10, page 12) that nothing in such letter altered the original invitation to respondent to state reasons why the Red Sea Charters were not subject to renegotiation, is clearly erroneous.

Petitioners attempt to escape the legal effect of notice of such determination by asserting that it was merely an expression of the personal opinion of the Board's counsel. The letter was on the letterhead of the United States Maritime Commission and was signed "Kenneth F. Clark, Price Adjustment Board". The notice fixed a time and place for a conference to be held, not for the edification of Mr. Clark, but for the serious purpose "of determining what portion of the profits" is excessive within the meaning of the Act (R. 44).

The petitioners suggest that the suit is premature because of the possibility that the Board and the Chairman may eventually reverse themselves and make a correct decision that the charters are not contracts with the Commission.[19] That is contrary to the holding of this court under

---

[18] Respondent had no contracts with the Commission during the years 1941 and 1942, as petitioners are aware.

[19] The Court may take judicial notice of hearings before a Congressional Committee with respect to the subject matter involved in pending litigation. That the Chairman has formed an opinion that excessive profits were realized, with respect to the Red Sea charters is shown by his own statements in the Hearings before a Sub-committee of the Committee on the Merchant Marine and Fisheries, House of Representatives, 78th Congress, 1st Session, pp. 10 and 13. The Chairman advised the Sub-committee that notwithstanding the fact that the charter rates were at least 25 percent under the going commercial rate at the time, in his opinion, the rates were excessive and the owners had been requested to make a voluntary refund of a portion of the charter hire. He informed the Committee that he had advised certain owners, of which respondent was one, that "from our investigation we are convinced that the rates were too high, and exceedingly so * * *."

facts almost identical with those in this case.[20]

The rendition of a decision on the merits in this case will not make "available to war contractors a means of effectively halting renegotiation proceedings at the threshold for substantial periods of time * * *" (Petitioners' Brief, p. 10), but will rather induce the departments to confine themselves to the task to which the Congress has appointed for them, namely, the renegotiation of contracts entered into with the departments specified in the Renegotiation Act.

IV.

Judicial Intervention is Proper When the Petitioners Have Already Acted by Illegally Setting in Motion Administrative Machinery not Applicable to Respondent's Charters with the British Government.

It clearly appears that the renegotiation of the charter agreements between respondent and the British Government, commenced by petitioners on November 26, 1943, is without authority of law and in defiance of the wishes of Congress. But the Board, nonetheless, has determined that the respondent realized excessive profits. If the charters are subject to the provisions of the Renegotiation Act, petitioners are required by law to withhold sums due respondent from the United States in the amount determined by them to be excessive profits. Under petitioners' argument, respondent must submit to such violation of the law; must permit money to be wrongfully taken away from it, and

[20] *Trust Company* v. *Schnader*, 291 U. S. 24 (See also 293 U. S. 112). The Court said: "* * * However, in view of the allegations of the bill, we are not inclined to hold the suit premature. The bill charges that the Secretary of Revenue has refused to issue a waiver of tax, and that the Attorney General has notified the appellant and the State's appraiser the property is subject to the tax, and the appellant's claim for exemption will be denied. The Commonwealth's law officers plainly intend to perform what they consider their duty, and will, unless restrained, cause the assessment and imposition of the tax. The action the legality of which is challenged thus appears sufficiently imminent and certain to justify the intervention of a court of equity."

must file a petition in the Tax Court for a redetermination of the irrelevant question of how much excessive profits were realized by it.

Whether, in deciding the case, the Tax Court would venture beyond the single question which the Renegotiation Act authorizes it to consider (the amount of excessive profits) is problematical, but since that Court has no authority under the Act to render money judgments, and since the Board's determination would have already been enforced,[21] it is clear that completion of the Tax Court proceedings would not finally determine the issue. If the respondent still had resources to litigate further, petitioners argue, it could then bring an action in some Federal court to recover the money which had been wrongfully taken away from it, and only at that stage would the petitioners concede that the case was ripe for a judicial decision of the sole question at issue, namely, had Congress subjected the charters entered into with the British Ministry to renegotiation.

Such a suit would no doubt be met with the defense that the provisions of the Renegotiation Act conferring exclusive jurisdiction to finally determine the amount, if any, of excessive profits, and providing that such determination shall not be reviewed or redetermined by any other court or agency, constitutes in effect a withdrawal of the consent of the United States to be sued for the recovery of monies so illegally withheld.

A similar argument was rejected by the Court in *Stark, et al.* v. *Wickard*, supra.[22] The Court stated:

---

[21] Sec. 403 (e)(1) of the Renegotiation Act provides that the filing of a petition in the Tax Court shall not operate to stay the execution of the determinations made by the Chairman. (App. C. p. 38)

[22] In the *Stark* case the Secretary of Agriculture attempted to withhold certain sums owing to the plaintiffs from third parties under color of the Agriculture Market Agreement Act of 1937, and the plaintiff sought to enjoin such Act as being in excess of the authority conferred upon the Secretary by such Act.

"Here, there is no forum, other than the ordinary courts, to hear this complaint. When, as we have previously concluded in this opinion, definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law, the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction. *When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted.* (Authorities) *This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction.* Cf. *United States* v. *Morgan*, 307 U. S. 183, 190-191. This is very far from assuming that the courts are charged more than administrators or legislators with the protection of the rights of the people. Congress and the Executive supervise the acts of administrative agents. The powers of departments, boards and administrative agencies are subject to expansion, contraction or abolition at the will of the legislative and executive branches of the government. These branches have the resources and personnel to examine into the working of the various establishments to determine the necessary changes of function or management. But under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons *or by the exertion of unauthorized administrative power.* (Italics ours.)

"It is suggested that such a ruling puts the agency at the mercy of objectors, since any provisions of the Order may be attacked as unauthorized by each producer. To this objecton there are adequate answers.

> • • • Technical details of the milk business are left to the Secretary and his aides. The expenses of litigation deter frivolous contentions. If numerous parallel cases are filed, the courts have ample authority to stay useless litigation until the determination of a test case. *Cf. Landis* v. *North American Co.*, 299 U. S. 248. Should some provisions of an order be held to exceed the statutory power of the Secretary, it is well within the power of a court of equity to so mold a decree as to preserve in the public interest the operation of the portion of the order which is not attacked pending amendment."[23]

The Administrative Machinery Established by the Renegotiation Act is Limited to a Determination of Whether Excessive Profits Exist with Respect to any Contract with a "Department", and the Amount Thereof.

The Renegotiation Act and its legislative history show conclusively that Congress intended to confer jurisdiction upon the Tax Court only to redetermine the amount of excessive profits.[24]

If the Congress had intended that the Tax Court have jurisdiction to determine questions presented in this case, it would have provided for a review by the courts of decisions of the Tax Court in the same manner as is provided for a review of the decisions of that Court with respect to a redetermination of tax deficiencies in order to afford ade-

---

[23] See also *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, *Philadelphia Company* v. *Stimson*, 223 U. S. 605, *Waite* v. *Macy*, 246 U. S. 606.

[24] The Committee on Ways and Means, of the House of Representatives, in its report upon the Revenue Bill of 1943 (Report No. 871, House of Representatives, 78th Congress, 1st Session) stated, with reference to the duties of the Tax Court:

> "Under existing law there is no right to appeal or review whereby the contractor may have the *question of his excessive profits redetermined*. • • • (Italics ours.)
>
> "The Tax Court of the United States is peculiarly fitted to determine what is fair price and what is fair profit, having long been engaged in the determination of similar questions and being thoroughly equipped for this purpose."

quate opportunity to secure judicial protection against arbitrary or unlawful action.[25]

No such provision was included in the Act. This was in accord with previous judicial precedent with respect to similar situations as exemplified in *In Re Fassett*, 142 U. S. 479. That case was before the Court on petition for a writ of prohibition to prohibit the District Court of the United States for the Southern District of New York from further

---

[25] In course of the passage of the Tax Court provision a requirement that the Tax Court make findings of fact was eliminated. The bill as introduced to and passed by the House contained a requirement that in a renegotiation matter, the Tax Court should be under the duty of complying with section 1117(b) of the Internal Revenue Code (26 U. S. C. A. 1117(b)).

(H. R. 3687, Sec. 701(b), amending Section 403(c) of the Sixth Supplemental National Defense Appropriation Act of 1942 (the 1942 Renegotiation Act), pages 119-122 of the bill as printed in the House, 78th Congress, 1st Session.)

Section 1117(b) provides:

> "It shall be the duty of the Board and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion. The Board shall report in writing all its findings of fact, opinions and memorandum opinions."

As indicated at page 83 in the Conference report, House Report No. 1079, 78th Congress, 2nd Session, the conference recommended that the provision of the Court of Claims as a forum for renegotiation cases be eliminated and that the Tax Court be restored as a forum.

> "except for the reference to Section 1117(b) of the Internal Revenue Code, imposing upon the Tax Court and each of its divisions the duty to include in its report upon any proceeding its findings of fact, or memorandum opinion and requiring such report to be in writing."

The rules of the United States Court of Appeals for the District of Columbia (Rule 36(b)(1)) relating to review of the decisions of the Tax Court, require that the Clerk of said Court transmit copy of the findings of fact and conclusions of law. Congress is presumed to have been aware of this requirement. The specific elimination of the provision that the Tax Court include in its report findings of fact would seem to be conclusive that the Congress did not intend for the Tax Court to decide questions which were otherwise subject to review by the courts.

proceeding on a libel for seizing a vessel and to obtain the delivery of the same and for damages. Fassett, as Collector of Customs, had forcibly taken possession of a yacht and deprived the owner of the use and control over her, and detained her for the enforcement of the payment of customs duties under the Tariff Act upon the claim that the yacht was an article imported into the United States. The yacht had been purchased in England and was later brought to the Port of New York. Upon her seizure by the Collector, the owner filed a libel against the yacht and the Collector, alleging that the seizure was illegal and wrongful for the reason that the yacht was not an imported article within the meaning of the Customs and Tariff Laws of the United States.

Section 14 of the Customs Administrative Act of June 10, 1890 (26 Stat. 131) provides that the decision of the Collector as to "the rate and amount" of duties chargeable upon imported merchandise is final and conclusive, unless the owner or importer within the time prescribed took steps to have the decision reviewed by the Board of General Appraisers.

The decision of this Board is made final and conclusive except, when under the provisions of Section 15 of the Act, an application for review shall be filed in the Circuit Court of the United States. The statute specifically provided that application may be made to that Court for a review of the questions of law and fact involved in the decision of the Board of General Appraisers. Upon the evidence taken by that Board and upon further evidence if given, that Court is to hear and determine such questions of law and fact "respecting the classification of such merchandise and the rate of duty imposed thereon under such classification." The Court in denying the Writ of Prohibition said: (p. 487)

> "The libellant has no other remedy than the filing of this libel. * * *
>
> * * * *
>
> "The appeal provided for in section 15 brings up for review in court *only the decision* of the board of general

appraisers *as to the construction of the law, and the facts respecting the classification* of imported merchandise, *and the rate of duty* imposed thereon under such classification. *It does not bring up for review the question of whether an article is imported merchandise or not;* nor, under section 15, is the ascertainment of that fact such a decision as is provided for. The decisions of the collector from which appeals are provided for by section 14 are only decisions as 'to the rate and amount' of duties charged upon imported merchandise, and the decisions as to dutiable costs and charges, and decisions as to fees and exactions of whatever character. Nor can the court of review pass upon any question which the collector had not original authority to determine. The collector has no authority to make a determination regarding any article which is not imported merchandise; and if the vessel in question here is not imported merchandise, the court of review would have no jurisdiction to determine any matter regarding that question, and could not determine the very fact which is in issue under the libel in the district court, on which the rights of the libellant depend. (Italics ours)

"Under the Customs Administrative Act, the libellant, *in order to have the benefit of proceedings thereunder, must concede that the vessel is imported merchandise*, which is the very question put in contention under the libel, and must make entry of her as imported merchandise, with an invoice and a consular certificate to that effect, and thus estop himself from maintaining the fact which he alleges in his libel, that she is not imported merchandise." (Italics ours)

This case describes the exact situation presented here.

The administrative agencies to which petitioners refer were set up for the purpose of determining *the amount* of excessive profits resulting from contracts with specified government departments and no other. They have exclusive jurisdiction for that purpose, and the decision of the Tax Court with respect to that is not subject to review.

In order to avail itself of the administrative procedure in the Renegotiation Act, respondent must concede that it

is a contractor with the Commission with respect to its charters with the British Government, thereby placing it in the position of alleging that its charters are subject to the provisions of the Renegotiation Act and asking the Tax Court to find that they are not subject to such provision. A mere statement of that proposition ought to be sufficient to refute the claim of petitioners herein and to show that the principal question involved in this case cannot be raised before or decided by the Tax Court.

VI.

The Determinations and Demands of the Petitioners are Void as Having Been Made Without Authority of Law and Respondent is Entitled to Equitable Relief.

Petitioners argue, and the District Court, in dismissing the complaint held that here no order has been issued in this case which brought it within the rule of *Skinner & Eddy Corp. v. United States*, 249 U. S. 557. (R. 51)

The rejection of respondent's claim that the charters are not subject to the Renegotiation Act, the determination that "there was in each case a contract between the vessel owner and the Maritime Commission to which the Renegotiation Act is applicable" and the requirement that statements, information and data be furnished clearly constitute an order. If the charters are subject to the provisions of the Renegotiation Act, the respondent may not lawfully refuse to furnish statements of actual cost and such other financial data as the petitioners may require. The reason it may not refuse is that the petitioners have, in effect, *ordered* the submission of such statements.[26] It is obviously incorrect

[26] Subsection (e) of Section 403 of the Renegotiation Act of 1942 provides that the Secretary of each department shall have the right to *demand* of any contractor who holds contracts "with respect to which provisions of this section are applicable", statements of actual costs and such other financial statements, at such time and in such form and in such detail as he may require. Willful failure or refusal to furnish any statement required subjects the contractor to criminal penalties.

to state that no order of any sort has been issued to the respondent herein. The petitioners have demanded that the respondent furnish statements, information and financial data on the erroneous determination which has been made that the charters involved herein are contracts "with respect to which the provisions of this section (Renegotiation Act) are applicable." That is an "order." Moreover, it is a final order with respect to the matter of furnishing the information demanded. Refusal of the respondent to comply with it, if lawfully issued, is punishable by a severe fine or imprisonment, or both. It is void *ab initio* and equity may relieve against it.

The Renegotiation Act of 1942 does not authorize the issuance of any "orders" *except* to the extent that it confers upon the secretaries the right "to demand" (to order) the submission of financial data and other statements. If the demand to furnish financial statements and other data under penalty of criminal punishment is not an order, then it is difficult to understand when an order ever would be said to have been made under the Renegotiation Act of 1942.

The determinations and orders made here are even stronger than that which was successfully challenged in *Shields* v. *Utah Central Railroad Company*, 305 U. S. 177. The Court held that an administrative "determination" which had the effect, if validly made, of subjecting the respondent to the requirements of the Railroad Labor Act was subject to judicial review in equity.[27]

In *Skinner & Eddy Corporation* v. *United States*, *supra*, we find the exact situation which is before the Court in this case. The Court held that an order of the Interstate Commerce Commission was void because it exceeded the statutory powers of the Commission and that the Courts have jurisdiction to enjoin the enforcement of the order even though the plaintiff *had not attempted to secure redress in a proceeding before the Commission.*

---

[27] See also *Utah Fuel Co.* v. *National Bituminous Coal Commission*, 306 U. S. 56.

No order at all was issued in *American School of Magnetic Healing* v. *McAnnulty*, supra, directing anyone to refrain from conducting business by mail. No order was issued in *Waite* v. *Macy*, supra, requiring *anyone to refrain* from importing tea. In those cases, the determinations were not directed to the complainants. They were directed to and purported to govern the activities of administrative officials in carrying out duties created by the statute.

But here we have an order directed to the respondent which denies an exemption from the terms of a statute;[28] it subjects respondent to a statutory command compelling conduct on its part in the submission of the data in the form and detail demanded by petitioners, failure to comply with which entails threats of oppressive penalties. Therefore, "the road to the Court's jurisdiction seems to be clear."[29]

VII.

The Doctrine of the Myers Case is not Applicable, Because the Statute Under Consideration There Provided Adequate Administrative and Judicial Remedies.

The petitioners argue that respondent is not entitled to equitable relief because it has not exhausted the administrative remedy provided in the statute. The Court below correctly held that no adequate remedy is available under the Renegotiation Act to determine the questions presented here. The petitioners rely upon *Myers* v. *Bethlehem Shipbuilding Corporation*, supra, and other cases of similar import, to support their contention that the respondent must first comply with the administrative procedure prescribed in the Renegotiation Act before seeking relief in the Courts. The decisions in those cases are not applicable to the facts

---

[28] *United States* v. *Atchison, Topeka & Santa Fe Railroad Co.*, 234 U. S. 476.

[29] *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125.

here.[30] Those decisions are in keeping with the established principle that where administrative officers are acting within the authority conferred upon them by a valid statute, the complainant must exhaust the administrative remedy prescribed therein. But the administrative remedy must be an adequate one.[31]

In the *Myers Case*, *supra*, as well as in the other cases on this point cited by petitioners, the statutes under consideration gave the respective administrative agencies no authority to enforce their orders except by Court proceedings, in which all appropriate defenses could be raised.[32] In none of the cases cited by petitioners did the administrative agency involved have authority to make determinations without a hearing, or to withhold monies due complainant without a hearing, or to enforce demands for statements, financial data and other information, without resort to judicial process.

In the case at bar, the Court is dealing with a statute which gives neither the petitioners nor the Tax Court jurisdiction over the charter agreements in controversy.

The Tax Court is not a court in the usual sense of the word. It is described by statute as "an independent agency in the executive branch of the government".[33]

---

[30] Appendix A and Appendix B, attached to petitioners' brief, except Administrative Order No. 64, appearing at page 27 thereof, are not a part of the record of this case, and will not be considered by the Court. However, the petitioners may not confer upon themselves, by the device described in such exhibits, authority which was not delegated to them by the Congress. The procedure outlined can relate only to contracts with a department.

[31] *Nelson* v. *First National Bank of Sioux City*, 42 F. (2d) 30; *Gilchrist* v. *Interborough Co.*, 279 U. S. 159.

[32] The Chairman is not required by the Renegotiation Act to invoke the aid of Federal Courts to compel obedience to his demand for information and financial data. He may make a unilateral determination and withhold monies without any resort to the Courts.

[33] 53 Stat. 158, 26 U. S. C. 1100 (derivation: Act of June 2, 1924, c. 234, Sec. 900, as added by Act of Feb. 26, 1926, c. 27, Sec. 1000, 44 Stat. 105.

That it is an administrative agency, and not a court has also been decided by the Courts.[34] And only recently the Supreme Court characterized the Tax Court as an administrative tribunal and stated that "every reason ever advanced in support of administrative finality applies to the Tax Court."[35] The Court was careful to point out that the statute creating the Tax Court provided for judicial review of its decisions with respect to its redetermination of a tax deficiency. The Renegotiation Act, as we have shown, does not provide for a determination by the Tax Court of the question involved in this case, and contains no provision for review of its decisions, therefore there is not "an adequate opportunity to secure judicial protection against arbitrary action."

The principle that the remedy upon its face must be adequate to meet the requirements of due process, in order to deprive an equity court of jurisdiction before such remedy is exhausted, was recently reaffirmed by this Court in *Yakus* v. *United States*, 321 U. S. 414. In that case petitioners had not availed themselves of the procedure set up by the Emergency Price Control Act, by which persons subject to the maximum price regulations might test its validity. It was contended by petitioners that the administrative procedure was inadequate, but the Supreme Court overruled this contention in view of the fact that

> "The Emergency Court has power to review all questions of law, including the question whether the Administrator's determination is supported by evidence, and any question of the denial of due process or any precedural error appropriately raised in the course of the proceedings. No reason is advanced why petitioner could not throughout the statutory proceeding, raise and preserve any due process objection to the statute, the regulations, or the procedure, *and secure its full*

---

[34] *Old Colony Trust Co.* v. *Commissioner of Internal Revenue*, 279 U. S. 716.

[35] *Dobson* v. *Commissioner of Internal Revenue*, 320 U. S. 489.

judicial review by the Emergency Court of Appeals and this Court." (Italics ours.)

And the Court stated in line with previous decisions that

> "Only if we could say in advance of resort to the statutory procedure *that it is incapable of according due process* to petitioners *could we conclude that they have shown any legal excuse for their failure to resort to it* or that their constitutional rights have been or will be infringed." (Italics ours.)[36]

That a remedy at law is neither certain nor adequate is apparent upon the face of the statute under consideration here. The Chairman, by simply applying the economic sanctions provided in the Act is able to enforce his unlawful determinations prior to any hearing or a judicial review.[37]

Applying the principles enunciated there to the statute in this case, it is evident that since there is no provision for judicial review which satisfies the requirements of due process, the respondent by following the procedure provided in the statute is without any legal remedy at all.

In the most favorable aspect of petitioners' contentions, whether the respondent could ever obtain relief at law is a matter of speculation. In no view can it be maintained that there exists a plain, certain, adequate and complete remedy at law in the absence of which respondent is entitled to relief in equity.

---

[36] See *Bradley v. Richmond*, 227 U. S. 477; *First National Bank v. Weld County*, 264 U. S. 450; and *Anniston Manufacturing Company v. Davis*, 301 U. S. 337; *Natural Gas Pipeline Co. v. Slattery*, 302 U. S. 300, 309; *Minnesota Ex Rel. Pearson v. Probate Court*, 309 U. S. 270, 277.

[37] This is just the type of procedure denounced by the United States Court of Appeals for the District of Columbia in *Hines v. United States, ex rel. Marsh*, 70 App. D. C. 206, 105 F. (2d) 85.

VIII.

Where a Multiplicity of Actions is the Only Alternative, the Intervention of Equity is Justified.

The nature of the contracts respondent has with various agencies of the United States, on account of which the Chairman might withhold or cause to be withheld, sums which he determines to be excessive profits realized under the charter agreements in question, are such that a multiplicity of suits in different jurisdictions would be necessary in an effort to recover the amounts so withheld, assuming that the remedy would be available to respondent. It may be necessary for respondent to bring actions upon numerous contracts, some of which may be cognizable in the Court of Claims and others in the United States District Courts sitting in Admiralty. Respondent, therefore, if denied the remedy granted by the Court below will be subjected to the burden of a multiplicity of actions and of litigating with agencies of the United States Government which have no direct interest in this controversy. This alone is adequate to sustain equity jurisdiction.[38]

As the Court said in *Ex Parte Young, supra:*

> "It would be an injury to complainant to harass it with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment, and to prevent it ought to be within the jurisdiction of a court of equity."

Moreover, were respondent remitted to numerous suits in order to recover amounts withheld by petitioners, the expense thereof would be such as to make the remedy elsewhere inadequate and the damage irreparable. Thus, in *Allen* v. *Regents*, 304 U. S. 439, the Court pointed out:

---

[38] *Wilson* v. *Illinois Southern Railway Co.*, 263 U. S. 574; *Union Pacific Railroad Co.* v. *Board of County Commissioners*, 247 U. S. 282; *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20; *Hopkins* v. *Southern California Telephone Co.*, 275 U. S. 393; *Ex Parte Young*, 209 U. S. 123.

"And if the respondent is right that the statute is invalid as applied to its exhibitions, it ought not to have to incur the expense and burden of collection, return, and prosecution of claims for refund of a tax upon others which the State may not lawfully be required to collect. These extraordinary circumstances we think justify resort to equity."

It is submitted, therefore, that respondent should not be turned to other proceedings where the remedy is inadequate and the expense thereof would be so great as to constitute irreparable injury.

IX.

Money Withheld and Covered Into the Treasury is Beyond Reach of Any Suit at Law.

Once the money which may be withheld by petitioners on account of contracts between respondent and the United States, is turned into the Treasury and mingled with the general funds, it is by no means clear that respondent could ever effect a recovery thereof.[39]

That the danger is real is manifest from the Court's decision in *Robinson, et al.* v. *Beal, et al.*, 79 U. S. Apps. D. C. 241, 145 F. (2d) 382, 384, where the Court stated:

"The fact that the fund in the *Haskins Bros.* case was derived from the imposition of a tax, while here it was from the imposition by Act of Congress of a condition to the sale of cotton produced in excess of allotment, is of no consequence. The controlling principle is based upon the presence of the fund at the time of suit in the Treasury. The fact, found by the District Court, that 'there is no congressional authority for withdrawal of money from the Treasury under the pool appropriation

[39] The Renegotiation Act provides, Sec. 403 (c) (2):

"All money recovered in respect of amounts paid to the contractor from appropriations from the Treasury by way of repayment or suit under this subsection shall be covered into the Treasury as miscellaneous receipts."

> tion account for payment to plaintiffs and intervenors,' leaves the courts without power to interfere."

Doubt alone concerning respondent's right to recover its funds, once they are covered into the Treasury, is sufficient to sustain the jurisdiction of an equity court. The remedy elsewhere to defeat jurisdiction here, must be equally "certain and in other ways efficient".[40]

But more important, whether the respondent would be relegated to the Court of Claims or to the Admiralty Court in suits on its contracts to recover monies withheld, it would be subjected to the additional hazard of complete loss of all its rights. This is because there can be no recovery against the United States for tortious acts of its officers. Thus, the Supreme Court has said:[41]

> "The distinction between property taken under authorization of Congress and property appropriated without such authority has long been recognized. Acts of government officials in taking property without authorization of Congress confer no right of recovery upon the injured citizen."[42]

The Court said in the *North American Transportation and Trading Company* case that what an officer of the government had done without authority was tortious and created no liability on the part of the government.

Therefore, if the petitioners in this case, acting without authority of law, withhold or cause to be withheld from respondent monies due it on contracts with the United States and consign the same to the Treasury, respondent may be completely barred from its recovery.

So long as petitioners have not actually seized respondent's property, an equity court—and only an equity court

---

[40] *American Life Insurance Co.* v. *Stewart*, 300 U. S. 203.

[41] *United States* v. *Goltra*, 312 U. S. 203, 208.

[42] *United States* v. *North American Transportation and Trading Co.*, 253 U. S. 330; *Phelps* v. *United States*, 274 U. S. 341; *Hooe* v. *United States*, 218 U. S. 322.

can stay petitioners' hands. It can prevent the threatened unlawful action.

The respondent should not be sent elsewhere, because when once the mischief is done, there may be no remedy at all.

X.

In no Event Could Respondent in any Forum Recover Interest on the Money so Seized.

In the event petitioners should withhold moneys due respondent, it would lose not only the use of its money, but the interest thereon during at least a portion of time necessary to recover it. It could not in any forum, if the money be wrongfully withheld, recover interest during the whole time necessary to its recovery.[43]

The Act of March 3, 1911, c. 231 (36 Stat. 1141) as amended, 28 U. S. C. 284, expressly says:

> "No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, * * *."

The Suits in Admiralty Act, c. 315 (47 Stat. 420), 46 U. S. C. Sec. 745 provides that

> "no interest shall be allowed on any claim prior to the time when suit on such claim is brought as authorized hereunder."

The fact alone that in no action could respondent ever recover interest on the amount withheld from it, is ground for jurisdiction in equity. This is demonstrated by *Hopkins* v. *Southern California Telephone Co.*, *supra*. Suit was brought by the telephone company to enjoin the county from seizing and selling certain telephone sets in satisfac-

[43] *United States* v. *Goltra*, *supra*; *United States* v. *U. S. Fidelity & Guaranty Co.* (10 C. C. A., 1939), 106 F. (2d) 804, reversed on other grounds 309 U. S. 506; *Henkels* v. *Sutherland*, 271 U. S. 298.

tion of a tax which the company claimed was in conflict with the Federal Constitution. The Court pointed out:

> "In no permitted proceeding at law could interest upon payments be recovered for the time necessary to obtain judgments."

The significance of plaintiff's inability to recover interest in any such actions as defendants suggest (as bearing on the inadequacy of such other remedies) is apparent also from *California* v. *Latimer*, 305 U. S. 255. The amount involved was $7,862.32. There the Court was able to find that payment would not cause irreparable injury because:

> "the amount paid with interest could be recovered if not due."

Here, that item never would be recoverable.

CONCLUSION.

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this Court and that the petition for a writ of certiorari should be denied.

Bon Geaslin,
520 Investment Building,
Washington 5, D. C.,
Attorney for Respondent.

Dated October 13, 1945.

Allen J. Krouse,
Of Counsel.

APPENDIX A.

The Shipping Act, 1916, as Amended.

Title 46 U. S. C.

"Sec. 808. *Registration, enrollment, and licensing of vessels purchased, chartered, or leased; regulations; coastwise trade.*

* * * * * * * *

"Except as provided in section 1181 of this title, it shall be unlawful, without the approval of the United States Maritime Commission, to sell, mortgage, lease, charter, deliver, or in any manner transfer, or agree to sell, mortgage, lease, charter, deliver, or in any manner transfer, to any person not a citizen of the United States, or transfer or place under foreign registry or flag, any vessel or any interest therein owned in whole or in part by a citizen of the United States and documented under the laws of the United States, or the last documentation of which was under the laws of the United States."

* * * * * * * *

APPENDIX B.

The Declaratory Judgment Act.

Title 28, U. S. C.

"Sec. 400. Declaratory judgments authorized; procedure

"(1) In cases of actual controversy (except with respect to Federal taxes) the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

"(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

"(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not."